

filed comments here noting its own interest in considering implementation of the LCI plan in that state, 21/ and already has conducted local competition hearings in which structural issues were an important topic. 22/ A number of other states have informally expressed strong interest in the plan.

Finally, a group of state consumer advocates have described the LCI Petition as "an important step in attempting to overcome some of the obstacles that have retarded local competition." 23/ These parties urge that the requirements of Section 271 must be enforced even if RBOCs separate their operations, a principle with which LCI strongly agrees. Like many IXC's and CLECs, they also suggest that LCI's plan does not go far enough, and that "further divestiture may be needed." 24/

These are the kind of issues that will be debated as states consider how they will regulate RBOC activities, especially in the post-Section 271 environment. The point here is that the Commission should grant the declaratory

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21/ Oklahoma Corporation Commission Comments.

22/ See Notice of Inquiry of the Oklahoma Corporation Commission Into the Status of Local Exchange Competition in Oklahoma and What, If Any, Steps Need to be Taken to Improve or Encourage Competition, Cause No. RM980000004, released Feb. 11, 1998.

23/ See State Advocates Comments at 2 (representing consumer advocacy agencies of California, Iowa, Maine, Maryland, Missouri, New York, Ohio, Pennsylvania, South Carolina, and Texas).

24/ *Id.* at 3.

rulings requested by LCI so that states can even more freely consider this option, and implement it even more quickly.

## **II. THE COMMISSION HAS LEGAL AUTHORITY TO ADOPT THE REQUESTED DECLARATORY RULINGS.**

### **A. The Fast Track Plan Does Not Expand Section 271 Requirements.**

LCI made clear throughout its Petition that Fast Track would be a voluntary plan, and that RBOCs would have no legal obligation to participate. Nevertheless, a number of RBOCs criticize the LCI Petition on the grounds that it would become a "*de facto*" requirement for interLATA entry. 25/ Because Section 271(d)(4) prohibits the FCC from limiting or extending the competitive checklist, the RBOCs argue that imposing this *de facto* requirement violates the Act. 26/

This argument is completely without foundation. LCI's Petition simply asks the Commission to establish a rebuttable presumption that, if the "seven minimums" of Fast Track are satisfied, checklist items are being provided in accordance with the requirements of Section 271, and the public interest standard has been met. In other words, the Commission would be stating in advance that, at least on this set of facts, it is willing to presume that a Section 271 application should be granted. Ironically, the RBOCs have been complaining that the FCC has been too slow to define the kind of factual circumstances that would satisfy the

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25/ See U S West Comments at 14; SBC Comments at 24.

26/ See Bell Atlantic Comments at 5-6; SBC Comments at 24; BellSouth Comments at 2.

checklist. The Commission has responded in at least one case by establishing a safe harbor of sorts for certain RBOC marketing activity that the Commission has ruled to be checklist-compliant. 27/ Similarly, the Commission has been engaged in broader discussions with the RBOCs regarding what steps they should take that would meet the checklist. Those discussions are taking place in the context of integration between RBOC carrier's carrier and retail activities. All that LCI is requesting here is a ruling that, if those RBOC activities are properly separated rather than integrated, a presumption of compliance with Section 271 would be warranted on those facts.

**B. Nor Does the Fast Track Plan Narrow Section 271 Obligations.**

Conversely, a number of other parties, including potential competitors to the RBOCs, express concern that the LCI proposal may be inconsistent with the Act because it is too generous to the RBOCs. These parties fear that an RBOC may separate its local network and retail operations as proposed by Fast Track and yet still not meet the requirements of Section 271. They are concerned that an RBOC will nevertheless win Section 271 authorization by virtue of the presumption granted here. 28/

These concerns are misplaced. The presumption we request is only that. LCI fully agrees that RBOCs cannot be excused from meeting all checklist

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27/ BellSouth South Carolina Order, ¶¶ 236-39.

28/ See AT&T Comments at 11-12; MCI Comments at 14; Competition Policy Institute Comments at 12; New Jersey Division of Ratepayer Advocate Comments at 4.

conditions simply by implementing the “seven minimums” of its plan. We acknowledge that the Fast Track Plan does not entirely eliminate incentives for an RBOC to manipulate NetCo to advantage ServeCo, or to take other anticompetitive steps that the checklist is designed to address. If it is shown that, notwithstanding the Fast Track safeguards, the RBOC is failing to satisfy the checklist, then the presumption will be rebutted. Similarly, if the Commission finds that an RBOC is not actually separating its operations in accord with the “seven minimums,” then there too the presumption would not apply.

That said, however, LCI would reemphasize that the presumption is meant to expedite Section 271 entry. If an RBOC is prepared to live under the Fast Track structure, with its ServeCo interfacing with NetCo on the same terms and conditions as other CLECs, then it is reasonable to presume that NetCo will satisfy the checklist requirements that are primarily designed to ensure just such equivalency. Similarly, the Fast Track structure will reduce the incentives and ability of NetCo to discriminate in favor of ServeCo, and increase ServeCo’s incentives to act as a competitive carrier rather than as a source of cross-subsidy for NetCo. Anticompetitive actions by NetCo are likely to be easier to identify and prevent. At least in these circumstances, LCI believes it is reasonable to presume that broad-based local service competition can develop for all consumers, and that the public interest standard otherwise has been met.

Again, LCI is not claiming that the Fast Track structure is the only factual setting in which an RBOC could satisfy Section 271. But we do submit that

it would benefit the public interest for the Commission to create the presumption we propose here.

**C. The Fast Track Plan Preserves The Jurisdiction Of The States.**

Notwithstanding LCI's acknowledgment of the substantial role that state commissions will play if an RBOC elects to proceed under Fast Track, the RBOCs argue on jurisdictional grounds that the FCC cannot adopt the federal elements of LCI's proposal. <sup>29/</sup> These arguments have no merit whatsoever. First, evaluation of an RBOC's compliance with Section 271 is a matter that is completely within the scope of the Commission's authority, subject to consultation with state commissions and the Department of Justice. As the United States Court of Appeals for the District of Columbia Circuit recently stated, "Congress has clearly charged the FCC, and not the State commissions, with deciding the merits of the BOCs' requests for interLATA authorization." <sup>30/</sup> The FCC therefore may issue the declaratory rulings LCI proposes because they all relate to matters that are within the FCC's authority.

This does not mean that the states do not have a role, however. We anticipate that if an RBOC chose to pursue the Fast Track option, the relevant state commission necessarily would be closely involved in the restructure and in conferring deregulatory treatment on the RBOC. Under the LCI plan, as we

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<sup>29/</sup> See BellSouth Comments at 2-3.

<sup>30/</sup> *SBC Communications v. FCC*, Case No. 97-1425, slip op. at 13 (D.C. Cir. March 20, 1998).

stressed in the Petition, 31/ the state commission retains every bit of its current jurisdiction over the RBOC. Nothing in the proposal would violate Section 2(b), as Fast Track does not mandate any changes in how the RBOCs provide intrastate services, nor does it place the FCC in the role of regulating matters related to intrastate service.

Nor would a state commission be limited in its ability to address the RBOC's satisfaction of the Section 271 requirements. A state commission could, for example, rebut the presumption of checklist compliance, add to the structural provisions that it believes to be necessary (pursuant to state law), or condition approval of the restructure on other actions by the RBOC.

The RBOCs also argue that the Commission cannot adopt Fast Track because an RBOC opting for the Fast Track plan would voluntarily agree to certain provisions that the Eighth Circuit ruled in *Iowa Utilities Board* were beyond the FCC's power to mandate. 32/ These parties argue that the Eighth Circuit made clear that the FCC may not do indirectly through Section 271 what the court has found it is forbidden from doing directly. 33/

Nothing in the Fast Track proposal violates the mandate in *Iowa Utilities Board* or the more recent order purporting to enforce that mandate with

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31/ Petition at 44-46.

32/ See U S West Comments at 8-9; Ameritech Comments at 7-10.

33/ See U S West Comments at 10-11; Ameritech Comments at 7; BellSouth Comments at 3.

respect to Section 271 implementation. 34/ The court in *Iowa Utilities Board* addressed the FCC's authority to mandate certain arrangements, but did not preclude ILECs from adopting those arrangements voluntarily. For example, the court found that the FCC lacked authority under the statute to require the use of a particular forward-looking cost-based pricing methodology or to require ILECs to make available provisions in interconnection agreements on a "pick and choose" basis, but it left ILECs perfectly free to undertake such arrangements if they wish to do so. 35/ Because Fast Track is completely voluntary, the FCC will not be imposing on any RBOC requirements that have been struck down by the Eighth Circuit.

**D. The FCC is Clearly Free to Condition Reduced RBOC Regulation on Adoption of the Fast Track Separation.**

Because the RBOCs focus so much of their attention on Section 271, they generally overlook the fact that the Commission clearly has authority to

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34/ In its order dated January 22, 1998, the Eighth Circuit held that the FCC lacked authority to consider pricing issues in the context of Section 271 applications because that would, in effect, impose national pricing standards on the RBOCs as a prerequisite to interLATA entry, violating the Eighth Circuit's earlier decision that pricing was a matter solely within the jurisdiction of the states. *Iowa Utilities Board v. FCC*, Order on Motions for Enforcement of the Mandate (8th Cir. Jan. 22, 1998), *pet. for cert. pending*. That decision, however, is likely to be reviewed by the Supreme Court, and in some respects appears to conflict with the more recent decision of the D.C. Circuit holding that the FCC has plenary authority with regard to implementation of Section 271. *SBC Communications*, slip op. at 13.

35/ Nor did the court address whether states have independent authority, either under the 1996 Act or under their own telecommunications regulatory statutes, to require many of these provisions in the context of individual arbitrations or general rulemakings.

condition reduced regulation *after* entry on adoption of the Fast Track structure. As we have noted repeatedly, Fast Track is designed to deal with competitive issues that will continue long after Section 271 entry, until the RBOCs no longer exercise bottleneck control over the local wireline network.

Where RBOCs discuss the issue at all, they merely assert that the Commission is moving away from use of structural safeguards. 36/ LCI will not repeat here the discussion in its Petition of how the Fast Track structure conforms to other instances where the Commission has conditioned participation in markets or reduced regulation on adoption of structural safeguards. 37/ As LCI demonstrated in the Petition, structural separation is a well-established mechanism for preventing anticompetitive and discriminatory activity and for promoting competition. Since the passage of the 1996 Act, the Commission has imposed or retained structural separation requirements in a number of different situations, including in-region interLATA services provided by independent telephone companies, in-region CMRS services provided by ILECs, and services provided by dominant international carriers affiliated with foreign carriers. 38/ Clearly an

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36/ See Ameritech Comments at 11-12; SBC Comments at 13-14. See also Petition at 37-39.

37/ LCI Petition at 36-41.

38/ See *Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area*, Second Report and Order and Third Report and Order, CC Docket Nos. 96-149, 96-61, FCC 97-142 at ¶ 173 (rel. April 18, 1997); *Amendment of the Commission's Rules to Establish Competitive Service Safeguards for Local Exchange Carrier Provision of Commercial Mobile Radio Services*, Report and Order, WT Docket No. 96-162, FCC 97-352 at ¶ 47 (rel. Oct. 3, 1997); *Rules and Policies on Foreign Participation in the U.S. Telecommunications*

approach that creates a voluntary structural option is within the Commission's authority.

### **III. RBOC COMPLAINTS REGARDING SPECIFIC ELEMENTS OF THE PLAN ARE UNFOUNDED, AND DISREGARD BENEFITS TO CONSUMERS.**

The RBOCs raise an assortment of complaints regarding specific elements of the Fast Track plan, none of which are well-founded. We show below that (1) any additional costs imposed by the plan are likely to be reasonable in the context of actions the RBOCs already are taking, and far outweighed by the plan's benefits; (2) the Fast Track plan will promote, not inhibit, network investment and is consistent with the Commission's universal service policies; (3) the plan is consistent with Section 251(c)(4); and (4) the transitional provisions proposed by LCI and other aspects of the plan are workable and reasonable. We discuss these issues below. We also address concerns and comments of other parties, including the suggestion that the Fast Track plan does not go far enough in separating RBOC bottleneck facilities from competitive activities.

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*Market; Market Entry and Regulation of Foreign Affiliated Entities*, Report and Order and Order on Reconsideration, IB Docket No. 97-142, 95-22 at ¶¶ 253-55 (rel. Nov. 26, 1997).

**A. The RBOCs Greatly Exaggerate the Additional Costs of Fast Track, Especially Given that They will Operate Separate Subsidiaries Anyway.**

Some RBOCs have protested that implementation of the Fast Track plan could force them to incur additional costs. However, there are several answers to this objection. 39/

First, and most fundamentally, the Fast Track Plan is voluntary. As a result, RBOCs will have to assess whether the benefits they derive from the separation outweigh the costs. Those benefits include in part the advantages flowing from interLATA entry. But more importantly, they include the ability to operate ServeCo on the same terms as a CLEC, with reduced regulation and opportunity to profit accordingly.

Second, RBOCs will be establishing separate subsidiaries for their interLATA services anyway pursuant to the requirements of Section 271 and 272. It follows that they already will be incurring many costs of separation. RBOCs make no attempt to quantify the additional costs that would be involved in consolidating all retail operations in one entity, but it is at least as likely that the RBOC would incur savings from doing so. Furthermore, we note that many ILECs already are creating retail CLEC affiliates anyway. 40/ They are doing so in an

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39/ U S West Comments at 5, 19-22; SBC Comments at 27, 28; Ameritech Comments at 14-15.

40/ See Competitive Telecommunications Association, Florida Competitive Carriers Association, and Southeastern Competitive Carriers Association, *Petition for Declaratory Ruling or, In the Alternative, For Rulemaking on Defining Certain Incumbent LEC Affiliates As Successors, Assigns, or Comparable Carriers Under*

attempt to deregulate themselves on a selective basis. 41/ LCI assumes that the Commission and the states will not permit this activity. But the Fast Track plan holds out a pro-competitive alternative to RBOCs who are willing to operate their ServeCo "CLEC" with appropriate safeguards.

Third, some RBOC complaints boil down to objections that they would incur the same costs as competitors. For example, SBC argues that the plan would increase ServeCo's cost of debt by requiring ServeCo to rely on its own, rather than its affiliate's, "sources of debt service." 42/ This is not necessarily clear, but even if true, it would simply place ServeCo on equal footing with other CLECs that are unaffiliated with dominant proprietors of bottleneck network facilities. Similarly, SBC cannot quantify the extent to which the plan might increase ServeCo's cost of equity by requiring public ownership and board membership in ServeCo, or the cost of imposing profit-making fiduciary duties on the ServeCo board. 43/ SBC also ignores the potential benefits to RBOC shareholders of separating the carrier's-carrier and retail functions of the company, allowing both to maximize profitability of their respective operations. For example, with public ownership, ServeCo will price its retail offerings at a level that is designed to cover its actual costs, and not

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*Section 251(h) of the Communications Act, CC Docket No. 98-39 (filed Mar. 23, 1998).*

41/ See *supra* at \_\_\_\_.

42/ SBC Comments at 26-27.

43/ SBC Comments at 28.

to facilitate cross-subsidies between NetCo and ServeCo, while NetCo will have newfound incentives to maximize the usage of its network by all CLECs, not just its own local retail operations.

Moreover, there is no basis for U S West's complaint that implementation of the plan would require RBOCs to incur OSS-related costs, namely, costs to "obsolete current systems and to design and develop new ordering, provisioning, repair and maintenance, and billing systems for new entrants." 44/ Such costs will be borne by the RBOCs regardless of whether they opt in to the Fast Track plan. Either way, the RBOCs must provide competitors parity with their own internal OSS. It is by no means clear that the RBOCs' costs will be higher if they create a single OSS to be used by both their own CLEC and competitive CLEC operations, rather than attempting to create a separate one just for competitors. In short, OSS-related costs are simply the costs of competition, not costs of the plan.

Some RBOCs also object to the restriction on ServeCo's sharing of the NetCo and HoldCo brand or trade names. 45/ This restriction is an essential element of the plan. The sharing of such valuable "goodwill" resources would severely undercut the separation of the corporate identities and strategic goals that constitute the foundation of the plan. As stated in LCI's Petition, such sharing would not only raise cost allocation difficulties, but also provide opportunities for joint activity that would abuse the relationship between the ServeCo and NetCo

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44/ U S West Comments at 5.

45/ BellSouth Comments at 11; U S West Comments at 11-12.

affiliates. 46/ Moreover, under the Fast Track plan, the RBOCs would be allowed to decide how they allocate current trade names between NetCo and ServeCo, and would be free to award the current RBOC brand name to ServeCo if they chose.

In short, the Fast Track structure provides a mix of benefits and costs that the RBOCs are left free to evaluate. LCI cannot speak to how the RBOCs will act once they move past their glib rejection of separation here. However, it is evident that the RBOCs are willing to restructure and even divest activity to increase shareholder value. For example, US West is preparing to spin-out its multi-billion dollar cable operations, MediaOne. MediaOne's president recently described this divestiture as "overwhelmingly positive for several reasons. First, it simplifies our regulatory existence. \* \* \* From that standpoint, US West will no longer have to sit on both sides of the [telco/cable] fence, and I can tell you personally it's a very complex thing to do." US West is proceeding with the spin-off even though it will cost the company approximately \$450 million. 47/

There are other important examples where a major carrier has voluntarily reduced or eliminated conflicts of interest, by definition incurring costs, but ultimately benefiting shareholders. Indeed these examples go back nearly 90 years, to the original "Kingsbury Commitment" where the Bell System agreed to

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46/ Petition at 29.

47/ See Interview with Chuck Lillis, President, MediaOne Group, Broadcasting & Cable, April 20, 1998, at 58. Of these costs, \$150 million are the direct cost of the splits and the balance are debt refinancing costs. Lillis states that overall "it's a fairly small cost, cash cost, if you will." *Id.*

stop acquiring independent telephone companies and to allow independents to obtain access to AT&T's then-monopoly long distance network. While this arrangement did not provide for competition in any sphere, it enabled independent telephone companies to thrive, while also benefiting the incumbent by expanding the traffic traversing AT&T's long distance network. 48/ The 1982 Modification of Final Judgment ("MFJ"), 49/ of course, is a direct precedent for LCI's Fast Track proposal. There too a voluntary AT&T action resolving conflicts of interest improved shareholder value. And more recently AT&T's divestiture of Lucent eliminated conflicts of interest that were preventing growth in its equipment business.

Again, LCI is not going to prejudge how the RBOCs will evaluate the costs and benefits of separation, particularly when they fully appreciate the burdens they necessarily will face from the heavy regulation required by their integration of carrier's carrier and retail activities. For present purposes, however, it is clear that the Commission should grant the declaratory rulings we request so that the RBOCs (and interested states) can evaluate these issues with more certainty.

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48/ Letter from Nathan C. Kingsbury, AT&T, to James C. McReynolds, Attorney General (Dec. 19, 1913) (*cited in* Michael K. Kellogg, John Thorne, and Peter W. Huber, *Federal Telecommunications Law* 200 (1st ed. 1992)).

49/ *United States v. AT&T*, 552 F.Supp 131 (D.D.C. 1982), *aff'd*, 460 U.S. 1001 (1983).

**B. The Fast Track Plan Is Consistent With Promoting Network Investment and Protecting Universal Service.**

**1. LCI's Proposal Will Promote Network Investment By NetCo and Does Not Threaten Recovery Of NetCo's Historic Costs.**

There is no merit to the contentions raised by some RBOCs that the retail restrictions on NetCo and, in particular, the UNE pricing requirements that would apply to NetCo, would make it difficult for NetCo to remain financially viable or to attract capital to maintain and upgrade the network. <sup>50/</sup> On the contrary, the LCI plan is more likely to lead to a healthy, strong NetCo.

First, under the Fast Track plan, NetCo will have significant incentives to invest in its network facilities and to deploy technologically advanced new facilities. NetCo will have every reason to preserve and maintain the value of its revenue-producing asset -- the ILEC network. Indeed, the fact that NetCo's customer base will consist primarily, and after the completion of the transition, entirely, of carriers (which tend to be technologically demanding customers),

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<sup>50/</sup> See, e.g., Bell Atlantic Comments at 7-8. Bell Atlantic also contends that these problems raise constitutional concerns. *Id.* Ameritech argues that NetCo's service quality would decline over time, Ameritech Comments at 13, and that that UNE pricing would make it impossible for RBOCs to earn a fair competitive return and would impair their ability and incentive to fund innovations and network investment. Ameritech Comments at 16-17, App. A at 2-4. BellSouth says LCI's plan would make NetCo a "lame duck carrier" and would effectively strip ILECs of their incentives to invest in new product development and network upgrades to retain their existing customers. BellSouth Comments at 11-12. See also SBC Comments at 7-8 (claiming that it is currently introducing innovative residential services, and that LCI has not shown how its plan would bring about any improvement for residential customers in this area); New Jersey DRA Comments at 6-7.

including a partial corporate affiliate, should help drive a rational technological investment strategy. 51/ To the extent ServeCo and/or independent CLECs need a particular new network technology or facility -- and particularly if there are economies of scale or scope -- NetCo should find it advantageous to deploy that facility itself and sell access to that facility (as a UNE) to ServeCo and other CLECs. 52/

Second, the contention that forward-looking cost-based pricing would discourage NetCo from maintaining or improving its existing network reflects a fundamental misunderstanding of the Commission's forward-looking cost pricing standard. Even under the now-vacated pricing rules adopted by the Commission in the 1996 *Local Competition Order*, it is clear that the Total Element Long-Run Incremental Cost ("TELRIC") pricing methodology requires state commissions to allow ILECs to recover through UNE prices the full cost of maintaining the existing network, including upgrades needed for the network to function. 53/ More

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51/ In fact, a failure of NetCo to offer new UNEs reasonably requested by CLECs could raise flags. Given that the Fast Track plan would not require full divestiture, there would remain some risk that NetCo could discriminate in favor of ServeCo, such as by denying reasonably requested network upgrades to ServeCo's competitors. But it would be far easier for regulators to identify, review, and address such allegations of discrimination under the separated structure we propose.

52/ For example, NetCo should be expected to deploy the network facilities necessary to upgrade ordinary copper loops to advanced xDSL loops, to which both ServeCo and other CLECs would obtain access as UNEs, using identical OSS and the same types of interconnection agreements.

53/ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, 15849-5, ¶¶ 686-92 (1996)

significantly for the deployment of new, technologically advanced facilities, the TELRIC methodology provides for a risk-adjusted rate of return, particularly in connection with new network elements that involve unusual investment risk. 54/ The Constitutional concerns raised by Bell Atlantic have been thoroughly aired and completely refuted by the Commission, in a ruling that no court has disturbed. 55/

Third, LCI's Fast Track plan does not rule out recovery of any possible "gap" between forward-looking costs of the UNEs to be offered by NetCo and any historic costs to which NetCo arguably has a right to recover. LCI does not address here the extent to which ILECs have a right to historic cost recovery, whether such a cost recovery "gap" exists, or the magnitude of that gap. But assuming that such a gap were shown to exist, under the current corporate structure, allowing recovery of that gap could have a damaging effect on competition, because competitors (or consumers) would have to subsidize that gap. That problem would be substantially reduced under the Fast Track plan because under any approach for recovering this gap, NetCo could recover such amounts from all service providers, including ServeCo, on a nondiscriminatory basis and with minimal distortions to local competition.

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*("Local Competition Order"), vacated in pertinent part sub nom. Iowa Util. Bd. v. FCC, 120 F.3d 753 (8th Cir. 1997), cert. granted.*

54/ *Id.*, 11 FCC Rcd at 15849-51, 15854-56, ¶¶ 686, 691, 699-703.

55/ *Id.*, 11 FCC Rcd at 15869-72, ¶¶ 733-40.

**2. The Plan Will Promote Facilities-Based Competition And The Deployment of New Technologies By Both ServeCo and Independent CLECs.**

Some commenters express concerns that the Fast Track plan could discourage facilities-based competition by reducing incentives to deploy alternative local telecommunications facilities to bypass the incumbent network. <sup>56/</sup> If this plan dampens those incentives at all, it would be because this plan actually provides the RBOC incentives to provide nondiscriminatory access to its network to all competitors, rather than thwarting such access, as it is doing today. All CLECs naturally would prefer to use their own network facilities if at all possible, rather than depend on the facilities provided by their principal competitors, and this preference will not change under the Fast Track plan. Rather, the availability of UNEs prevents, at most, the inefficient deployment of uneconomically duplicative facilities that would impose increased costs on consumers -- just as Congress intended.

It is more likely, in fact, that the Fast Track plan would actually stimulate the construction of *efficient* competitive local exchange facilities because it would create the basis for viable widespread local competition. <sup>57/</sup> ServeCo itself also could, if it chose to, invest in new technology and shield the availability of that technology (and the associated retail services) from competitors, because ServeCo,

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<sup>56/</sup> See, e.g., Ameritech Comments, App. A at 4-6.

<sup>57/</sup> See LCI Petition at 43-44; LCI Comments on Bell Atlantic/U S West/Ameritech Section 706 Petitions at 9-12, CC Docket Nos. 98-11, 98-26, and 98-32 (filed Apr. 6, 1998).

unlike NetCo, would not be required to offer competitors access to its facilities as UNEs under Section 251(c)(3) or access to its retail services at an avoided-cost discount under Section 251(c)(4). In such a case, ServeCo would use NetCo's facilities through exactly the same interconnection arrangements as other CLECs. CLECs would have the same ability as ServeCo to deploy such facilities -- and the prospect of competition between ServeCo and independent CLECs would goad both types of competitors to do so -- *but on equal terms*.

Finally, the Fast Track Structure supports facilities-based competition in another respect. LCI concedes that its plan alone does not address the continuing incentives of the RBOC to discourage deployment of competing networks, either through discrimination or cross-subsidization. This problem is present today, and it will inevitably continue in the future. However, under the Fast Track structure, the task of regulators is made simpler. They can focus most if not all of their enforcement resources on prevention of anticompetitive acts by NetCo. They can address important questions related to deaveraging of NetCo prices to reflect cost. And they can do all this without impacting the retail market because ServeCo will be interfacing with NetCo on the same terms as other carriers, whatever those terms may be.

In short, the Fast Track plan solves important problems, and makes the remaining problems easier, not harder, to solve.

### **3. The Fast Track Plan Will Promote Universal Service.**

LCI showed in its petition that the Fast Track plan is consistent with the Commission's goal of promoting universal service. <sup>58/</sup> Increased local competition is not only consistent with universal service, it is the best way to achieve universal service. By breaking down the RBOCs' incentives to impede competition, the LCI plan will result in broader availability of UNEs in the configurations needed by both ServeCo and other CLECs to serve the entire spectrum of local customers, including all residential customers. This broad-based competition would impose pricing discipline on basic local exchange rates and the rates for other related services, such as vertical services, leading to reasonable retail rate levels for residential customers and many potential choices of local service provider. There is no reason to suppose, moreover, that such competition would not take place in high cost areas as well, because competitors (whether ServeCo or other CLECs) would receive universal service support if they serve customers in those areas via UNEs or their own facilities.

SBC nevertheless suggests that the plan fails to address universal service issues such as how much universal service support CLECs (including ServeCo) would receive, and whether CLECs that target particular groups of residential customers should receive support. <sup>59/</sup> Not only are these *generic* issues regarding local competition and universal service that have little to do with LCI's

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<sup>58/</sup> LCI Petition at 23, 42-43.

<sup>59/</sup> SBC Comments at 32.

specific plan, 60/ but they are issues that the Commission has already decided in the *Universal Service* proceeding. 61/ Consistent with those decisions, NetCo, ServeCo, and independent CLECs each will receive high-cost and low-income universal service support based on the individual consumers they serve via UNEs or their own facilities. 62/ NetCo will also continue to receive such support as long as it provides retail service to customers. 63/

SBC erroneously confuses the issues of historic cost recovery and universal service support in its challenge to LCI's petition: it asks how universal service support would be affected by the need for recovery of NetCo's stranded investment after more profitable customers had switched to ServeCo or other

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60/ Similarly, when SBC complains that the competition for optional/vertical services that would be unleashed by LCI's plan would force RBOCs to lower prices for such services and increase rates for basic local exchange service correspondingly, SBC Comments at 6, its real dispute is with local competition itself, not with LCI's plan. In the same vein, SBC's and BellSouth's assertions that the local competition stimulated by LCI's plan will not benefit consumers with lower rates because residential rates are already artificially low and subsidized, SBC Comments at 5-7; BellSouth Comments at 10, amount to complaints about local competition generally rather than having any relevance to LCI's plan. *But see* State Advocates at 6 (arguing for capping ServeCo's residential rates at no more than current levels, and contending that consumer benefit is foundation of Section 271 "public interest" test).

61/ Specifically, high-cost support and low-income support will be distributed among ILECs (such as NetCo) and CLECs (including both ServeCo and independent carriers) on a per-customer basis, based respectively on the geographic location and socio-economic status of the customers they serve. *See, e.g., Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, 12 FCC Rcd 8776, at 8939-42, 8962-68, ¶¶ 300-04, 350-63 (1997) ("*Universal Service Order*").

62/ LCI Petition at 23, 42.

63/ LCI Petition at 43.

CLECs. 64/ As discussed above, NetCo will be compensated fully for its provision of network elements and other offerings to carriers using its network, both before and after it ceases to be a retail provider. SBC also fails to understand that the Commission's new universal service policy has severed the connection between large ILECs' historic cost recovery and the forward-looking subsidies needed to support universal service in high-cost areas and for low-income consumers. 65/ There is no conflict between the Fast Track plan and universal service goals; indeed, by stimulating broad-based local competition, Fast Track should promote universal service.

**C. The Fast Track Plan Does Not Violate Section 251(c)(4).**

Ameritech and U S West contend that the Fast Track plan would harm CLECs that seek to use employ resale of ILEC retail services under Section 251(c)(4) by degrading the wholesale network, withdrawing new services, products, and features from availability to resellers, and essentially eliminating Section 251(c)(4) resale as a viable method for new competitors to provide local service. 66/ These objections -- which were not made by any *reseller* party in this case -- are unfounded.

First, Section 251(c)(4) requires only that "any telecommunications service that [an ILEC] provides at retail to subscribers who are not

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64/ SBC Comments at 32.

65/ *Universal Service Order*, 12 FCC Rcd at 8899-902, ¶ 224-31.

66/ Ameritech Comments at 14; U S West Comments at 16-19.

telecommunications carriers" 67/ must be made available at a wholesale discount. To the extent an ILEC offers retail services, therefore, it must do so at a wholesale discount. That section does not require that an ILEC offer a particular service, or any services at all, at retail. An ILEC that does not offer any retail telecommunications services to non-carriers thus would not violate Section 251(c)(4) because they are not subject to that requirement. 68/

Second, if U S West were correct that the Fast Track plan severely disadvantaged non-facilities-based resellers, one would expect those parties to have come out against the plan. But the Telecommunications Resellers Association, which represents hundreds of resellers of telecommunications services, strongly supports the plan. 69/ Resellers clearly believe that the advantages presented by the Fast Track plan far outweigh any disadvantage due to the ultimate lessened availability of total service resale under Section 251(c)(4). Entrants will have other, better, options for serving customers without owning facilities of their own -- the very options that ServeCo will employ to serve its own local exchange customers.

Third, while Congress wanted to make available to CLECs an option based on local service resale, with an avoided cost-based wholesale discount, real-world experience has shown that the utility of this approach is quite limited.

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67/ 47 U.S.C. § 251(c)(4)(A).

68/ Such a carrier also would be in compliance with Section 271(c)(2)(B)(xiv), the checklist item that merely refers back to Sections 251(c)(4) and 252(d)(3).

69/ TRA Comments.

Indeed, some of the major carriers that might have been expected to rely largely on resale under Section 251(c)(4) have declared publicly that this approach is economically unworkable. <sup>70/</sup> Put simply, the fact that LCI's Fast Track plan might reduce the utility or limit the availability of service resale under Section 251(c)(4) says nothing about the impact of Fast Track on local competition.

Fourth, it should be noted that all local exchange carriers, including ServeCo and other CLECs, have a duty under Section 251(b)(1) to permit resale of their telecommunications services. As a result, resale carriers will retain sources of supply if they want wholesale local service; they only would not see the wholesale discount that has proven to be competitively inadequate anyway to date.

Finally, and in any event, even if the Commission finds that it must ensure the availability of discounted local service, that result can be accommodated here. LCI has attempted to the maximum extent possible to put ServeCo in the same position as other CLECs. That is the reason for the declaratory ruling we request here that ServeCo would not be deemed a successor or assign for purposes of Section 251(h), and therefore would not be subject to the obligations of Section

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<sup>70/</sup> "And thanks to the uneconomical discounts of [service resale] and the lack of [unbundled network platform], we're losing \$3 a month on each customer. AT&T is not going to spend money on this fool's errand, and that's what [service resale] is today. So we've had to temporarily stop actively marketing consumer local service. MCI and Sprint have done the same thing, and no RBOCs have shown up to compete anywhere for local service." Speech by C. Michael Armstrong, President and CEO, AT&T, Delivered to Economic Strategy Institute Forum on Telecom Act of 1996, *Give the Telecom Act Time to Work* (Feb. 10, 1998).

251(c). However, as an alternative the Commission could conclude that ServeCo is a successor only for the purposes of meeting the Section 251(c)(4) obligation.

**D. The Fast Track Plan, Including Its Transition Provisions, Does Not Pose Significant Implementation Problems.**

Contrary to some parties' contentions, the transitional provisions proposed by LCI and other aspects of the plan are workable and reasonable. In this section, we address the questions raised by commenters regarding implementation of the plan.

*How Fast is the "Fast Track?"* Contrary to the claims of some RBOCs, 71/ the Fast Track plan would speed, not slow, RBOC entry into in-region interLATA markets. Indeed, expedited interLATA entry is a core element of the plan's incentive system. 72/ Because the plan, by its structure, neutralizes the RBOCs' conflict of interest, the plan would eliminate the primary barriers to local competition and allow the RBOCs to leap forward into presumptive compliance with Section 271 much faster. Without the structure, an RBOC would be forced to overcome its inherent conflicts of interest to meet the Section 271 requirements -- something that to date has proved impossible. The Fast Track plan is slower than

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71/ Bell Atlantic Comments at 5; Ameritech Comments at 3, 6, 17-19; *see also* Bell South at 6-7.

72/ Some RBOCs argue that in addition to slowing interLATA entry, the plan provides inadequate assurance that LCI or other CLECs will not oppose a RBOC's 271 application, or that the FCC will grant such an application. *See, e.g.,* Bell Atlantic Comments at 5-6, 28. But the rebuttable presumption proposed by LCI would provide exactly that assurance.